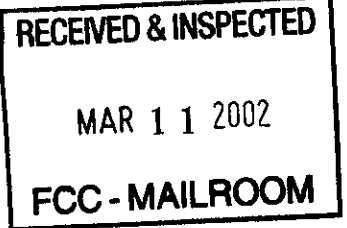




UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and
Information Administration
Washington, D.C. 20230

ORIGINAL

March 7, 2002



Mr. William F. Caton
Acting Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, DC 20554

EX PARTE OR LATE FILED

Re: *Ex parte* Letter, Promoting Efficient Use of Spectrum Through Elimination of
Barriers to the Development of Secondary Markets, WT Docket No. 00-230

Dear Mr. Caton:

Enclosed please an original and two (2) copies of the *ex parte* letter from Nancy J. Victory, Assistant Secretary for Communication and Information, National Telecommunications and Information Administration, to Michael K. Powell, Chairman, Federal Communications Commission in the above-referenced proceeding. Copies of the letter have been delivered via facsimile to Chairman Powell, each of the Commissioners, and Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau.

Please direct any questions you may have regarding this letter to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Kathy D. Smith
Chief Counsel

Enclosures

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UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

ORIGINAL

March 7, 2002

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EX PARTE OR LATE FILED

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of Promoting Efficient Use of Spectrum Through Elimination of
Barriers to the Development of Secondary Markets, WT Docket No. 00-230

Dear Chairman Powell:

The Commission currently has open before it a proceeding to consider whether and how to permit secondary markets for spectrum use.¹ On behalf of the Administration, I write to urge the Commission to act promptly to conclude this proceeding and to move expeditiously to permit leasing and eliminate other barriers to the development of secondary markets for spectrum.²

All Americans benefit tremendously from the convenience, efficiency, and safety associated with wireless services and technologies. The spectrum needed to deploy such services, however, is limited. Today, we are especially feeling the pressure of spectrum scarcity. It is therefore essential that we move forward quickly to identify and implement innovative ways to maximize its use. Leasing and other secondary market activities promise to increase spectrum efficiency by allowing radio frequencies to be used in ways that more closely follow changing demand. Private sector leasing arrangements would not only provide opportunities and incentives for licensees to ensure full use of their spectrum, but also would address changes or spikes in spectrum demand faster and more effectively than the government licensing process.³ Not

¹ In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Notice of Proposed Rulemaking*, 15 FCC Rcd 24203 (2000) ("NPRM").

² The National Telecommunications and Information Administration (NTIA) serves as the President's principal adviser on telecommunications and information policies as they pertain to the Nation's economic and technical advancement, has the authority to develop and set forth those policies, and has the responsibility to ensure that the views of the Executive Branch are effectively presented to the Commission. *See e.g.*, 47 U.S.C. §§ 902(b)(2)(D), 902(b)(2)(I), 902(b)(2)(J).

³ Changing demands met through the secondary market would not be limited to those of a commercial nature. Implementation of the secondary markets proposal could also advance important public safety goals by allowing
(continued on next page)

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surprisingly, all of the commenters in this proceeding unanimously support permitting private, secondary market arrangements.⁴

Commission action authorizing leasing and other secondary market activities is consistent with the market-based spectrum management approach that the Commission has been pursuing with great success.⁵ Further, as the Commission notes, *de facto* leasing already takes place in some circumstances, such as for Instructional Television Fixed Services, where parties are allowed to sell excess capacity. Leasing is also permitted with satellite time and through the relatively new band manager licensing regime. The secondary market concept would broaden these limited leasing venues and extend the benefits of leasing arrangements across the entire spectrum.⁶

NTIA agrees with the Commission that it should initially limit secondary arrangements to spectrum allocated on an exclusive basis for wireless radio services.⁷ As noted by the

(continued from previous page)

additional frequencies to be made available, perhaps on a stand-by basis, for major events (such as the Olympics) or in times of emergency.

⁴ See, e.g., Reply Comments of Rural Telecommunications Group at 1; Comments of the Small Business Administration, Office of Advocacy at 1,4; Comments of AT&T Wireless Services at 1-2, Comments of the SDR Forum at 1; Comments of Teligent at 2; Comments of the National Telephone Cooperative Association at 1; Comments of Satellite Industry Association at 1-2; Comments of Cellular Telecommunications and Internet Association at 3.

⁵ See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order*, 7 FCC Rcd 6886, 6890 (1990) (first use of voluntary relocation agreements); In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Second Report and Order and Order on Reconsideration*, 15 FCC Rcd 14680, 14680 (2000)(increased flexibility in mobile spectrum); In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, WT Docket No. 01-14, 2001 FCC LEXIS 6768, 3 (rel. Dec. 18, 2001)(phased elimination of spectrum caps).

⁶ NTIA agrees with the Commission that the *Intermountain Microwave* criteria do not provide the appropriate framework in which to encourage leasing. NPRM at ¶ 74, citing *Intermountain Microwave*, 12 FCC 2d 559 (1963). *Intermountain Microwave* is not a statutory standard and the Commission has the discretion to reassess and change the standard in the public interest. The Commission has interpreted *Intermountain Microwave* over the years to permit an ever-widening range of arrangements that constitute, in essence, "leases." Within the discretion afforded the Commission to assess what constitutes "control" for purposes of section 310(d) of the Communications Act of 1934, it is clearly appropriate for the Commission to develop new standards in this context in place of those of *Intermountain Microwave*.

⁷ See NPRM at ¶¶ 64-65.

ORIGINAL

Commission, shared spectrum raises much more complex interference and frequency coordination issues than exclusive spectrum. Further, shared spectrum provides a greater opportunity for a potential secondary user to be licensed outright, provided that appropriate sharing arrangements can be reached (which would be a prerequisite of secondary use). Similarly, because of the unique obligations placed on broadcasters, the Commission should not permit secondary arrangements for mass media licenses at this time. Once more experience is gained with secondary arrangements, however, NTIA urges the Commission to revisit whether and how such arrangements might be extended to these other types of licenses.⁸

As the NPRM correctly notes, it is essential to establish the right rules of the road for these secondary market relationships so that such use maximizes, rather than detracts from, efficient spectrum use. In doing so, it is important to maximize flexibility for these arrangements as much as possible. NTIA believes that the following parameters strike the right balance for making secondary markets a success:

There Should Be No Secondary User Registration or Certification Requirements. In permitting secondary market activities, the Commission should not attempt to regulate or micromanage the leasing process or require secondary user registration or secondary filings. Not only would it be administratively burdensome for the Commission to review all the additional leasing arrangements, but the delays and burdens associated with doing so would thwart many of the benefits associated with leasing. Imposing such a secondary layer of regulation is also utterly unnecessary. As detailed below, NTIA advocates that licensees retain ultimate responsibility for any activity under their license. By making licensees ultimately responsible, the Commission will have a mechanism for ensuring that its rules are followed. NTIA would suggest, however, that the Commission adopt rules imposing certain minimum criteria for licensees to follow in entering into lease arrangements to ensure appropriate licensee intervention in the event of misuse by a lessee. Specifically, the Commission should require licensees (1) to maintain on file contact information for any secondary users of their spectrum, (2) to have contractual authority to terminate the lease in response to a violation of law or interfering use by the lessee, (3) to approve any subsequent subleases, and (4) to assist in enforcement of lease conditions and administrative regulations.

⁸ At that time, the Commission will need to consider how to ensure effective coordination of secondary users with other users of the band. This will be particularly important where a band is shared between Federal government and non-Federal government users.

The Licensee Must Retain Ultimate Responsibility for Compliance. In any leasing or secondary market relationship, the licensee must remain ultimately responsible for adhering to the obligations of its license. Retaining “certain essential rights and obligations”⁹ within lease arrangements is consistent with axioms of real property and uniform commercial practice, from which the principles of leasing arise.¹⁰ Keeping the licensee responsible for any use within the scope of its license will provide incentives for the licensee to construct appropriate covenants, indemnifications and limitations within its contract to ensure appropriate use by the lessee. Such appropriate use would include compliance with all of the interference, frequency coordination and other technical rules applicable to the spectrum being licensed. This continued responsibility will reduce concerns by other licensees and authorized government users over how to address claims of interference.¹¹ NTIA does not believe that such retention of responsibility by the licensee would create a disincentive for the licensee to engage in leasing spectrum.¹²

Secondary Users Should Be Subject to the Same Technical and Service Rules as Licensees. It is axiomatic that a party to a lease acquires no greater rights than the underlying leaseholder. The same should hold true for spectrum leases – a lessee should have no greater rights to use the spectrum than does the licensee. Rules and limitations on licenses are adopted for a purpose. Technical rules, for example, are vital to interference protection. Similarly, service rules represent policy choices made by the

⁹ See *NPRM* at ¶ 79.

¹⁰ The general rule of property is that the underlying lessee is responsible for compliance with lease terms by a sublessee. See 49 Am. Jur. 2d §1176 (stating that “the original lessee is liable for any violation of the covenants of the lease by the sublessee, whether the lessee knew of such violation or not”). Some commenters note that under uniform commercial practices sublessors are not responsible for such acts as violations of the law. However, in those instances the violations are presumably beyond the essential terms of the underlying lease. Under the FCC’s proposal, the license granted by the FCC is the equivalent of an underlying lease, and the appropriate analogy is therefore to the duties of a lessee and sublessee to the lessor.

¹¹ See, e.g., Reply Comments of Nextel at ii.

¹² At least one commenter asserts that the incremental revenue realized would be “more than offset by the threat of forfeitures, non-renewals, and revocations on unsuspecting licensees for the transgressions of lessees.” Comments of Rural Telecommunications Group at 2. Presumably, however, the Commission would craft penalties in accordance with the nature of the offense, and that the licensee could forestall harm by an indemnification clause in its lease. The Commission should not adopt a “good faith” approach by which it limits responsibility of licensees to situations where it knew or should have known that a lessee would likely violate the rules. Cf. Comments of the Cellular Telecommunications and Internet Association at 15.

Commission in the public interest. It would be unfair and confusing to treat licensees and their lessees differently based merely on their contractual positions. Of course, to the extent that service or technical rules for particular frequencies are unduly restrictive, they should be reviewed and removed. Any increased flexibility should be made available to licensees and lessees alike. NTIA encourages the Commission continually to review its rules to increase opportunities for technical and spectrum use flexibility.

While Aggregation Limits Remain, They Should Apply to Secondary Market Arrangements. The Administration applauds the Commission's recent decision to eliminate the CMRS spectrum cap effective January 2003 and to relax the cellular cross-ownership restriction.¹³ However, while these and any other spectrum aggregation limits remain in effect (and NTIA encourages the Commission to continually review the need for such restrictions), lessees should be subject to them just like licensees. An entity should not be exempt from aggregation limits adopted and maintained for competitive reasons simply because the entity is leasing spectrum from a licensee rather than being licensed directly through the Commission. To do otherwise could encourage lease arrangements for purposes of subverting the Commission's competition rules rather than for spectrum efficiency purposes.

Eligibility Rules Should Apply to Secondary Market Arrangements for Now. Other rules that restrict the types of entities that can use particular spectrum or the uses that can be provided in a set of frequencies should apply to secondary market arrangements, at least initially.¹⁴ A primary benefit of secondary market arrangements is that they are designed to put spectrum to its most highly valued use. The problem is that not all publicly beneficial uses of spectrum are highly valued in the commercial marketplace. For example, a public safety entity that needs spectrum for a critical law enforcement purpose, might not be able to compete for spectrum in the secondary market against commercial users. Similarly, it would be unjust for an "entrepreneur," who obtained spectrum at auction with a bidding credit subsidy or from an "entrepreneur's block," to lease that spectrum for full market value to a lessee who would not have qualified for a credit. Thus, the Commission should ensure that eligibility and spectrum use restrictions extend to secondary market relationships, at least for now. However, NTIA urges the

¹³ See, In the Matter of 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *supra* note 5.

¹⁴ Licensees that use spectrum on a non-commercial basis should be permitted to lease spectrum through secondary market arrangements so long as the lessee uses the spectrum for non-commercial purposes.

Commission to reexamine the applicability of such rules to secondary users periodically and consider exceptions if alternatives exist that would maximize spectrum efficiency while continuing to serve the public interest.¹⁵

In sum, NTIA urges the Commission to move promptly to permit leasing and to eliminate other barriers to the development of secondary markets for spectrum. Given the need for innovative approaches to maximize use of the finite radio spectrum and a record indicating overwhelming support for this approach, the time is ripe for the Commission to act. In doing so, the Commission should refrain from micromanaging secondary market relationships, but rather set minimal rules of the road that impose ultimate responsibility for compliance on the licensee. The Commission should also continue to pursue other efforts to grant additional flexibility and to maximize spectrum use.

Sincerely,



Nancy J. Victory

cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau

¹⁵ For example, the Commission should consider exceptions for “swaps” or “cross-leasing” of spectrum usage rights, such as between one PCS “entrepreneur” licensee and another or between a commercial provider and an industrial provider in nearby bands. If the swap or cross-leasing gives the parties access to equivalent spectrum, there would be no inequity or unjust enrichment.